IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 784

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

LORAINE ELLIOTT, *Respondent*.

RESPONDENT'S ANSWER BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent submits that the writ of certiorari herein sought by the petition of General Motors Corporation should be denied because no reasons exist for the allowance of the same as prescribed by Part V, Rule 19, Paragraph 1, of the Revised Rules of the Supreme Court of the United States.

In effect, the petitioner states two reasons for the granting of the writ for which it has applied. The first position taken by respondent is to the effect that in deciding the tort question involved in this case, the Seventh Circuit Court of Appeals did not follow or apply existing Indiana law in contravention of the decision of this Court handed down in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). The other reason advanced by the petitioner in support of its petition is that the Seventh Circuit Court of Appeals is governed by the rules of the Sixth, Eighth and Ninth Circuit Courts of Appeal and in its recent decision deviated from a rule of these three other courts by deciding the case as it did.

The *Erie R. Co.* v. *Tompkins* decision cannot be of assistance to the petitioner in its application for this writ because the Seventh Circuit Court of Appeals applied and construed the law and decisions of the Indiana Supreme and Appellate Courts in arriving at its recent opinion in this case. In the *Erie* case the District Court and Circuit Court of Appeals followed the doctrine established in the case of *Swift* v. *Tyson*, 16 Pet. 1, 18; 10 L. ed. 865, 871, to the effect that in diversity cases if there was no State statute involved, the questions therein presented would be determined as a matter of general federal law. Accordingly, the District Court and Circuit Court of Appeals declined to decide the issues of State law in the *Erie* case; however, the opinion of this Court established that this was error, and held that in diversity cases, the federal courts were bound to decide substantive issues by the law of the State involved.

The Seventh Circuit Court of Appeals in the case at bar diligently and painstakingly searched for, construed and applied the applicable law of the State of Indiana to the issues of the case. In so doing that Court considered

five different decisions of the Indiana courts and one statute of the State, viz: *Laudeman* v. *Russell & Co.* (1910), 46 Ind. App. 32, 91 N.E. 822; *Travis* v. *Rochester Bridge Co.* (1919), 188 Ind. 79, 122 N.E. 1; *Coca-Cola Bottling Works of Evansville* v. *Williams* (1941), 111 Ind. App. 502, 37 N.E. (2d) 702, 706; *Holland Furnace Co.* v. *Nauracaj* (1938), 105 Ind. App. 574, 14 N.E. (2d) 339, 342; *Smith* v. *State*, 169 Ind. 260, 82 N.E. 450, 451; Burns' Ind. Stat. Ann. (1933), 1946 Replacement, Section 4-215, p. 1122.

A very casual reading of the opinion of the Seventh Circuit Court of Appeals should be sufficient evidence to even the most uninformed layman that the Court searched for, found and applied the law of Indiana to the issues of the case.

Although there was application of the Indiana law to the facts and issues in this case by the Seventh Circuit Court of Appeals, the petitioner attempts to use the *Erie* case as a means to review decisions of Indiana and courts of other jurisdictions construing Indiana law on this point. Even though it is not conceded that the *Erie* case is authority for this procedure, none the less, Indiana law does not predicate liability in products cases on the presence or absence of contract privity between the injured plaintiff and the negligent manufacturer.

The petitioner cites and relies upon two cases as authority for its position that lack of privity in Indiana will defeat the bringing of a products liability case. These two cases are *Laudeman* v. *Russell & Co.*, 46 Ind. App. 32, 91 N.E. 822 (1910) and *Travis* v. *Rochester Bridge Co.*, 188 Ind. 79, 122 N.E. 1, 3 (1919). It is to be noted that neither of these cases was concerned with a manufacturer. The *Laudeman* case involved the sale of a secondhand thresh-

ing machine and the *Travis* case dealt with a contractor who had constructed a bridge to the specifications of a county unit of government. Any reference to the law of products liability in the opinion of these cases is dicta, and the rule established in *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), was not mentioned or discussed in the briefs or opinions.

On the other hand there is abundant authority in the Indiana decisions that the rule established in the *MacPherson* case has been accepted in that State, all as was decided by the Seventh Circuit Court of Appeals in the case at bar. In the Indiana Appellate Court's opinion in *Coca-Cola Bottling Works of Evansville* v. *Williams*, 111 Ind. App. 502, 37 N.E. (2d) 702, 706 (1941), the *MacPherson* v. *Buick* case is cited by name and the reasoning therein approved. Although this was an Appellate Court decision, a petition for transfer was denied by the Indiana Supreme Court, and this denial is equivalent to approval of the conclusion reached by the Appellate Court. To the same effect is the case of *Holland Furnace Co.* v. *Nauracaj*, 105 Ind. App. 574, 14 N.E. (2d) 339, where the opinion of the Appellate Court was written in terms of the "imminently-dangerous" product rule of the *MacPherson* v. *Buick* case. A petition to transfer, filed in this case, was also denied by the Indiana Supreme Court.

Other courts, when called upon to decide what rule or exception would be followed by the Indiana Supreme Court in product liability cases, have held that the case of *MacPherson* v. *Buick* would control. To this effect is the case of *McCloud* v. *Leavitt Corporation*, 79 F. Supp. 286, 291 (1948) and also the very recent case of *Wojciuk* v. *United States Rubber Co.*, 13 Wis. (2d) 173, 108 N.W. (2d) 149, 155 (1961).

A very exhaustive examination and treatment of this subject matter is found in 74 ALR 2d, page 1111, and it is interesting to note that on page 1158 of this treatise the State of Indiana is cited as one of the jurisdictions giving "support, express or clearly implied" to the imminently-dangerous product exception to the privity rule as established in the *MacPherson* v. *Buick* case.

Also, a recent holding by Julius Hoffman, Judge of the United States District Court, Northern District of Illinois, in a case before him and involving the question of privity in Indiana may be of some interest to this Court. The case in question is titled *James William Wells, as Executor of the Estate of Betty M. Wells, deceased* v. *Northwest Airlines, Inc., a corporation, Lockheed Aircraft Corporation, a corporation and General Motors Corporation, a corporation*, Cause No. 60-C-1813, and involves a crash of an Electra aircraft at Tell City, Indiana, resulting in decedent's death. The defendant, General Motors, raised the defense that there could be no recovery because Indiana law required privity of contract. On October 31, 1961, Judge Hoffman in disposing of this question, held that privity of contract was not a prerequisite to recovery in Indiana in a tort action against a negligent manufacturer.

The Court will note that neither of the two cases relied upon by petitioner involved a manufacturer or manufactured product. On the other hand, the cases relied upon by the Seventh Circuit Court of Appeals in reaching its decision did involve manufacturers.

The last reason given by petitioner for the granting of the writ is that, although bound to follow a rule of the Sixth, Eighth and Ninth Circuit Courts of Appeal, the Seventh Circuit Court of Appeals failed to do so in reaching its

decision. With this position the respondent cannot agree, and even if this were true in fact, the only permissible decision that could have been reached by the Judge of the District Court below was that the law of Indiana does not require privity of contract before a manufacturer can be held liable for injuries proximately resulting from the negligent manufacture of his product.

Respectfully submitted,

LEON D. CLINE,
427 Third Street,
Columbus, Indiana,
HOWARD S. YOUNG, JR.,
1030 Circle Tower,
Indianapolis, Indiana,
Attorneys for Respondent.